BAKAR AHMAD

v.

SUBRAMANIAM KANNIAH

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR SCJ
[CIVIL SUIT NO. 22-34-90]
13 JUNE 1992

CIVIL PROCEDURE: *Application to strike out statement of claim on grounds that there is no reasonable cause of action - O. 18 r. 19 Rules of the High Court 1980 - What constitutes "reasonable" - Application to discharge interlocutory prohibitory injunction - Necessary to balance between the possibility of injunction not achieving purpose and need of protection for plaintiff - O. 29 r. 2(4) Rules of the High Court 1980 - Imposing conditions on interim order.*

The plaintiff and the defendants, by way of their affidavits, made contradictory claims with regard to the ownership and use of a lorry. The plaintiff was the registered owner. The defendant operated the vehicle. When the plaintiff and the defendant fell apart, the former obtained an interlocutory prohibitory injunction restraining the latter from disposing of the lorry. Subsequently the plaintiff obtained an *inter partes* interlocutory mandatory injunction requiring the defendant to deliver to the plaintiff the lorry pending trial with liberty to the defendant to apply to set aside. The defendant while claiming that the lorry was missing sought to strike out the writ of summons and statement of claim. He also sought to discharge the interlocutory prohibitory injunction and interlocutory mandatory injunction obtained by the plaintiff.

Held:

[1] On the application to strike out the statement of claim on the grounds that there was no reasonable cause of action, the question arose as to what is "reasonable". This may be answered by saying that as long as a statement of claim, including any particulars discloses some cause of action or some question fit to be decided by the Court on a question of law or fact or mixed fact and law the action should be allowed to proceed. The fact that the case was weak or not likely to succeed was beside the point. Here, the transaction was complicated, giving rise to questions which ought to be tried so that there are seriously arguable points as such the power to strike out under O. 18 r. 19 of the Rules of the High Court 1980, should not be exercised.

[2] The fact that there was a greater or lesser probability that an injunction will be either futile or incapable of compliance are merely factors that a Court will take into account in exercising its discretion. Here, it was necessary to balance between the possibility that the injunction will not achieve its purpose as contended by the defendant with the need of the plaintiff for protection and all the other considerations tending for and against the grant of relief. In the circumstances, the interlocutory mandatory injunction was modified requiring the defendant to forthwith deliver the lorry to the plaintiff provided it was still in the possession or under the control of the defendant, his servants or agents.

[3] By way of postitude, the learned Judge stated that consideration should be given for the making of an order for preservation of the subject matter of the action to wit, the lorry under O. 29 r. 2(1) if, and when, the lorry was returned to the plaintiff. Also under O. 29 r. 2(4) the Court may impose conditions upon the interim order requiring the plaintiff, within reasonable

time of delivery of the lorry, to be held in storage at some specified commercial garage after having insured it against loss or damage. However, he held that whether or not such an order for preservation under O. 29 r. 2(1) should be made could only be determined upon the application being made to the Court by summon supported by affidavits and after hearing the respective Counsel.

[Defendant's application dismissed. Costs in the cause and order for an early trial.]

Cases referred to:
Sajan Singh v. Sardara Ali [1960] 1 All ER 269 ***(cit)***
Drummond-Jackson v. British Medical Association [1970] 1 WLR 688 ***(cit)***
Dadswell v. Jacobs [1887] 34 Ch D 278 ***(cit)***
Kellaway v. Bury [1892] 66 LJ 602 ***(cit)***
Moore v. Lawson [1915] 31 TLR 418 ***(cit)***
Wenlock v. Moloney [1965] 1 WLR 1238 ***(cit)***
Home Office v. Dorset Yacht Co. [1970] AC 1004 ***(cit)***
Lea v. Thursby [1904] 89 LT 744
Wyatt v. Palmer [1899] 2 QB 106 ***(cit)***
Evans v. Barclays Bank & Galloway [1924] WN 97 ***(cit)***
Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co. [1892] 3 Ch D 274 ***(cit)***
Chaffers v. Goldsmid [1894] 1 QB 186 ***(cit)***
Dawkins v. Prince Edward of Saxe - Weimar [1876] 1 QBD 499 ***(cit)***
Willis v. Earl Beauchamp [1886] 11 PD 59 ***(cit)***
Shepherd Homes Ltd. v. Sandham [1971] Ch 340 ***(cit)***
Locabail International Finance Ltd. v. Agroexport [1986] 1 WLR 657 ***(cit)***
Leisure Data v. Bell [1988] FSR 367 ***(cit)***
Von Joel v. Hornsey [1895] 2 Ch 774 ***(cit)***
Woodford v. Smith [1970] 1 WLR 806 ***(cit)***
Hadmor Productions Ltd. v. Hamilton [1983] 1 AC 191 ***(cit)***
Attorney-General v. Guardian Newspaper Ltd. [1987] 1 WLR 1248 ***(cit)***
Vincent v. Peacock [1973] 1 NSWLR 466 ***(cit)***
Chaplin v. Barnett [1912] 28 TLR 256 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 29 rr. 2(1), 2(4)

Other source referred to:
Equitable Remedies, Spry, 4th Edn., p. 547

For the plaintiff - Gan Teik Chee; M/s. Gan Teik Chee & Co
For the defendant - S.P. Annamalai; M/s. Annamalai & Co.

JUDGMENT

Edgar Joseph Jr SCJ:

This was a defendant's application to strike out the writ of summons and statement of claim herein on the grounds that it discloses no reasonable cause of action and/or it is frivolous or vexatious and/or it is an abuse of the process of the Court under the provisions of O. 18 r. 19 of the Rules of the High Court 1980, and under the inherent jurisdiction of the Court and that an *ex parte* interlocutory prohibitory injunction granted on 26 January 1990 and an *inter partes* interlocutory mandatory injunction granted on 7 March 1990, be discharged.

For a better understanding of the issues which arise for decision on the present application it would be convenient if I referred to the background facts as they appear in the pleadings and in the rival affidavits; the defendant having affirmed an affidavit in support, followed by

an affidavit in opposition by one Eng Chai Khoon ("Eng") who was said to be an agent of the plaintiff, a further affidavit by the defendant and a joint answering affidavit by Eng and a friend named Wong Min Fuat.

The plaintiff's version was that by an oral agreement made on 8 May 1989, the plaintiff had, through his agent Eng, permitted the defendant to operate a motor lorry bearing registration No. PAJ 5108 ("the lorry") of which he was the registered owner in consideration of receiving 50% of the incomings derived from the use of the lorry and on condition that the defendant was to deliver it up to the plaintiff on demand.

This arrangement, according to the plaintiff, remained in force until September 1989 but, thereafter, the defendant defaulted with making the payments required under the oral agreement, whereupon the plaintiff demanded the return of the lorry through his agent Eng but the defendant refused and thereby converted the lorry to his own use and so wrongfully deprived the plaintiff thereof by reason whereof the plaintiff suffered damage.

The defendant's version was that he and Eng had jointly purchased the lorry and had it registered in the plaintiff's name as the latter was a Bumiputra and held a carrier's licence; the consideration for this arrangement being the payment to the plaintiff of a sum of RM150 p.m. while the defendant and Eng received the incomings derived from the use of the lorry which they shared equally between themselves and no doubt the expenses as well.

If true, this transaction would plainly have been tainted by illegality since, under the relevant road traffic legislation, a carrier's licence is personal to the holder, and may not be assigned or sub-let.

Nevertheless, it continued in force until about October 1989, when the defendant and Eng fell apart because the defendant became unhappy with the way the accounts relating to the lorry were kept by Eng and, consequently, with the division of the profits. The defendant therefore took possession of the lorry and, at the same time, took over the keeping of the accounts and the distribution of the profits.

The defendant went on to say that he was away in India from 15 December 1989 until 5 January 1990, and upon his return from India he found that the lorry was missing. This caused the defendant to make a police report on 5 February 1990 wherein he had stated that on 30 December 1989, at about 10 a.m., he had himself parked the lorry in front of a shop at Ladang Badenoch, Tawar, and when he emerged from it he discovered the lorry was missing.

In their joint answering affidavit, Eng and his friend Wong, pointed to an obvious inconsistency appearing in the defendant's own version; namely, that if, as the defendant had said, he was in India between 15 December 1989 and 5 January 1990, he could not very well have parked the lorry on 30 December 1989 outside the shop at Ladang Badenoch, Tawar. To which the defendant replied by his further affidavit that it was all the mistake of the Malay recording officer at the police station. What he said was that he spoke in Malay when making his report and had said that it was his brother who had parked the lorry outside the shop.

Upon the plaintiff's version aforesaid, Wan Adnan J had on 26 January 1990, granted an interlocutory prohibitory injunction that the defendant by himself, his servants or agents or otherwise be restrained from disposing of, dismantling, destroying or selling, the lorry.

Then, on 7 March 1990, on the plaintiff's *ex parte* application, supported by the affidavit of Eng, Wan Adnan, J had granted an interlocutory mandatory injunction that the defendant do forthwith deliver up to the plaintiff the lorry pending the trial of the action with liberty to the defendant to apply to set aside.

Before me, it was contended by Counsel for the defendant that the plaintiff's legal title to sue is disputed as there was an Ali Baba sort of illegal business transaction and so the writ of summons and statement of claim ought to be struck out under O. 18 r. 19.

It was further contended that there was a serious dispute upon the facts and certainly no clear proof of the plaintiff's claims.

It was also contended that the plaintiff's claims, if true, would afford grounds for a cause of action in detinue and conversion for which damages would be an adequate remedy and these could be assessed by determining the value of the lorry.

In any event, it was contended that the defendant did not have possession of the lorry and, therefore, it would be impossible for the defendant to comply with the mandatory injunction for delivery up of the lorry. Accordingly, both the injunctions should be discharged.

On the other hand, Counsel for the plaintiff contended that it would be wrong to strike out the writ of summons and statement of claim because the plaintiff's claim was not founded upon an illegal contract but on simple trespass to goods, conversion and detinue as in the Privy Council case of *Sajan Singh v. Sardara Ali* [1960] 1 AER 269.

I shall take, firstly, the defendant's prayer to strike out the statement of claim as disclosing no reasonable cause of action or as being frivolous, vexatious or an abuse of the process of the Court.

A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered. (See *Drummond-Jackson v. British Medical Association* [1970] 1 WLR 688). It follows, that the question is not whether it discloses a good cause of action or answer, but whether it discloses a reasonable one. [See *Dadswell v. Jacobs* [1887] 34 Ch D 278, per Cotton LJ at 281 and see *Kellaway v. Bury* [1892] 66 LT 602 per Lindley LJ at p. 602: "The pleading will not be looked at through the glass of an old special pleader".)

The question, therefore, as to what is "reasonable" in the above context, may be answered by saying that as long as the statement of claim, including any particulars, discloses some cause of action or some question fit to be decided by the Court, whether it be a question of law or fact or of mixed fact and law, the action should be allowed to proceed. The fact that the case is weak or not likely to succeed at the trial is beside the point. (See *Moore v. Lawson* [1915] 31 TLR 418 (C.A.); *Wenlock v. Moloney* [1965] 1 WLR 1238; *Home Office v. Dorset Yacht Co.* [1970] AC 1004).

Clearly, when as here, the transaction is a complicated one, as appeared from the prolonged and serious argument advanced by Counsel on both sides - giving rise to questions which ought to be tried so that there are seriously arguable points, the power to strike out, conferred upon the Court, whether under the provisions of O. 18 r. 19 or under the inherent jurisdiction, should not be exercised. [See *Lea v. Thursby* [1904] 89 LT 744 affirmed 90 LT 265 CA and *Wyatt v. Palmer* [1899] 2 QB 106 at 110; *Evans v. Barclays Bank & Galloway* ([1924] WN 97 (CA)].

I would add, that in considering this branch of the application to strike out I had kept in mind that where the only ground upon which an application to strike out is that the pleading discloses no reasonable cause of action, or defence, no evidence is admissible. (See *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch D 274). However, in an application on any of the other grounds mentioned in the rule or where the inherent jurisdiction of the Court is invoked affidavit evidence may be, and is

ordinarily used. But, where the facts are in dispute, it is not permissible to try the action on affidavits.

It follows from what I have just said that I do not consider that the statement of claim is frivolous or vexatious or an abuse of the process of the Court. A pleading or an action is frivolous when it is without substance or unarguable. Examples of such a pleading would be where a party is trifling with the Court (e.g. *Chaffers v. Goldsmid* [1894] 1 QB 186] (action against an M.P. for refusing to present a petition)) or when to put it forward would be wasting the time of the Court (e.g. *Dawkins v. Prince Edward of Saxe-Weimar* [1876] 1 QBD 499 per Mellor J) or when it is not capable of reasoned argument or it is without foundation or when it cannot possibly succeed or where the action is brought or the defence is raised only for some annoyance or to gain some fanciful advantage or where it can lead to no possible good (e.g. *Willis v. Earl Beauchamp* [1886] 11 PD 59 per Bowen LJ at 63 (action brought to revoke letters of administration after nearly 90 years struck out)).

I can now turn to consider the defendant's prayer to discharge the *ex parte* mandatory injunction.

In *Shepherd Homes Ltd. v. Sandham* [1971] Ch 340 (approved by the Court of Appeal in *Locabail International Finance Ltd. v. Agro-export* [1986] 1 WLR 657 and *Leisure Data v. Bell* [1988] FSR 367) Megarry J (as he then was) said that at an interlocutory stage "the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction.

But, the *dictum* of Megarry J is qualified by the words "in a normal case" and he also said, at p. 349 A, "the subject is not one on which it is possible to draw firm lines or impose rigid qualifications".

It requires a still more exceptional case for an *ex parte* interlocutory mandatory injunction to be granted, even when a plaintiff gives a proper undertaking as to damages. (See *Von Joel v. Hornsey* [1895] 2 Ch 774). Nevertheless, as *Spry on Equitable Remedies*, 4th Edn. p. 547 says, there are circumstances where relief of this nature may be appropriate such as where a structure erected on the land of the defendant is causing immediate and extremely serious interference with the conduct of a business or else personal inconvenience of an extremely serious nature.

And, a little further down on the same page, Spry goes on to explain why it is so difficult to obtain an *ex parte* interlocutory mandatory injunction; namely, that the Court simply enquires as to the manner in which the positions of the parties may most reasonably be dealt with pending more detailed consideration of the matters that are in issue; and it is only because sufficient urgency is very rarely able to be established that it is generally found to be inequitable to grant interim or *ex parte* relief of this nature.

In his written submission, Counsel for the plaintiff has contended that the interlocutory mandatory injunction should remain in force for otherwise there was the risk that before the trial, the defendant would sell the lorry or its component parts by dismantling it. On the other hand, it was said that ordering the lorry to be returned to the defendant will result in no adverse consequences to the defendant which could not be compensated for in damages.

Lastly, it was contended, that even if maintaining the interlocutory mandatory injunction would have the effect of granting to the plaintiff all or practically all the benefits and advantages which are sought at the final hearing, that in itself does not necessarily mean that the interlocutory mandatory injunction should be dissolved. (See *Woodford v. Smith* [1970] 1 WLR 806).

On the other hand, Counsel for the defendant has by his written submission contended that the defendant does not now have possession of the lorry or any knowledge of its whereabouts, it being alleged that Eng had taken it away while the defendant was in India. In any event, it was contended that the plaintiff's claims are for damages for detinue and conversion which can easily be quantified.

Now, if the effect of an injunction is not certain, and there is simply a greater or lesser probability that it will be either futile or unable to be complied with, these considerations are merely taken into account by the Court in the exercise of its discretion. Here, it is necessary to balance the possibility that the injunction will not achieve its purpose with the need of the plaintiff for protection and all the other considerations tending for and against the grant of relief. (See *Hadmor Productions Ltd. v. Hamilton* [1983] 1 AC 191, at pp. 223-224).

It follows, therefore, that the possibility that the purpose of the particular injunction concerned will not be achieved depends therefore on other circumstances of the case. Sometimes it is decisive against the grant of relief. But, in appropriate circumstances there may be so great a risk of injury to the plaintiff that it is found to be just that relief be granted despite the possibility that it will subsequently be shown to be futile. (See *Attorney General v. Guardian Newspapers Ltd.* [1987] 1 WLR 1248).

More particularly, it has been said that it ill lies in the mouth of a defendant who intends to act in contravention of a plaintiff's right to assert that an injunction should not be granted against him because it would not confer upon the plaintiff the benefit that he seeks; and so relief will not ordinarily be refused on the ground of futility unless that futility is **quite clear** or unless there is **disproportionate hardship** to the defendant that renders damages more appropriate.

But, if after an injunction is granted, it becomes clear that compliance is impossible or else is futile, it may, in certain circumstances, be dissolved or suspended; and in deciding whether the balance of justice inclines towards the grant of relief the Court may have regard not only to its powers to suspend or discharge its order subsequently, but also its power to make the material order conditional on either the occurrence or non-occurrence of a particular event.

However, I need hardly add, that contumacy or intransigence or voluntary refusals to comply with the order of Court do not not amount to futility or impossibility of performance in the sense here being discussed. (See *Vincent v. Peacock* [1973] 1 NSWLR 466).

It is obvious from the rival affidavits to which I have referred, that on the question where the lorry now is or what has happened to it, the plaintiff and the defendant are blaming each other. One thing however is clear and, that is, on his own admission the defendant was the last person known to have had possession of the lorry. He claims, however, that Eng took it away while he was away in India. Even if it was taken away without his knowledge or consent, he was in no position to say that it was Eng who did so or that Eng had caused it to be taken away. Eng and the plaintiff have, of course, denied the allegation and their case is that the lorry remains in the possession of the defendant.

Now, it is not for me at an interlocutory stage to decide disputed questions on the affidavits of persons I have not even seen. On the other hand, bearing in mind the principles to which I have just referred, I am unable to say that it is **clear** that the interlocutory mandatory injunction cannot be complied with by the defendant because he is not in possession or in control of the lorry. But, there is a great risk of injury to the plaintiff, because the defendant - if he is in possession of or in control of the lorry - may cause it or its parts to be disposed of.

Therefore, I consider that the interlocutory mandatory injunction should be maintained, even though it may subsequently be shown to be futile. However, in the circumstances, I would modify that part of the interlocutory mandatory injunction requiring the defendant to forthwith deliver up the lorry to the plaintiff by adding the rider "provided the lorry is in the possession of or under the control of the defendant, his servants or agents".

I would add, lest I be accused of an oversight, that I do not consider that damages would be an adequate remedy, because the plaintiff holds a carrier's licence for the lorry, which is personal to him and not assignable and, therefore, this lorry is of particular value to him. Also, there is no evidence before me to show that in the event of damages being awarded at the final hearing the defendant would be in a position to pay them.

Finally, I had also paid special regard to the interests of all parties concerned, keeping in mind their foreseeable positions, considerations of hardship, the balance of convenience and all other relevant discretionary factors.

For the reasons stated, I also do not consider that there are any grounds for discharging the interlocutory prohibitory injunction to which I would, as in the case of the interlocutory mandatory injunction, add an identical rider.

In the result, subject to the qualifications I have mentioned, the defendant's application is dismissed but I would order that costs be costs in the cause and that there be an early trial.

Since preparing this judgment in draft there are certain matters which have occurred to me which I wish to refer to by way of postlude.

If, and when, the lorry is returned to the plaintiff or his authorised servant or agent, in compliance with the mandatory injunction aforesaid, consideration should be given for the making of an order for preservation of the subject matter of the action to wit, the lorry, under the protective measure of O. 29 r. 2(1) which says:

> 2.(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

The case of *Chaplin v. Barnett* [1912] 28 TLR 256 shows that O. 29 r. 2(1) extends to every case in which the Court sees that as between the parties something ought to be done for the security of the property the subject matter of the action or, as to which, a question may arise in the action. The property sought to be protected ordinarily would be the physical subject matter of the action; in this case, the lorry. Moreover, under O. 29 r. 2(4) the Court may impose conditions to which the interim order would be subject; for example, in the present case, the Court may order that the lorry, within a reasonable time of its being delivered to the plaintiff or his authorised servant or agent, be held in storage at some specified commercial garage but, no doubt, only with the consent of the garage, on terms that the applicant for the order should be responsible pending trial for insuring it in a specified sum with an insurer of repute against loss or damage by specified risks.

It goes without saying, however, that whether or not any order for preservation under O. 29 r. 2(1) should be made, and if so, subject to what terms (if any), can only be determined upon application being made to the Court by summon supported by affidavit at the appropriate time, and after hearing Counsel on both sides.

Also found at [1992] 4 CLJ 1833